



Office of the Attorney General  
State of Texas

DAN MORALES  
ATTORNEY GENERAL

November 16, 1998

Ms. Julie B. Ross  
Haynes and Boone, L.L.P.  
201 Main Street, Suite 2200  
Fort Worth, Texas 76102-3126

OR98-2699

Dear Ms. Ross:

On behalf of the City of Harlingen (the "city"), you ask whether certain information is subject to required public disclosure under the Open Records Act, chapter 552 of the Government Code. Your request was assigned ID# 119573.

You have submitted two open records requests for related information concerning the requestor's employment with the city. The first request for information asks for "information used by [the city] in determining that disciplinary action was necessary to impose on," the requestor. The second request for information seeks the requestor's personnel file, information concerning the requestor's termination, and "who has been provided any information about" the requestor.<sup>1</sup> In response to the request, you submitted to this office for review the records which you assert are responsive. Although you agree to release much of the requestor's personnel file, you assert that the submitted information is excepted from required public disclosure by sections 552.101 and 552.103 of the Government Code.<sup>2</sup> We have considered the exceptions you claim and have reviewed the documents at issue.

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<sup>1</sup>The Open Records Act does not require a governmental body to answer factual questions or to perform legal research. Open Records Decision Nos. 555 (1990), 379 (1983), 347 (1982).

<sup>2</sup>We also note that the requestor claims and provides documentation that previous requests were made to the city for similar information. Section 552.301 of the Government Code provides that a governmental body must ask the attorney general for a decision as to whether requested documents must be disclosed not later than the tenth business day after the date of receiving the written request. Failure to request an attorney general decision within the deadline provided by section 552.301(a) results in the presumption that the requested information is public. Gov't Code § 552.302; *City of Houston v. Houston Chronicle Publ'g Co.*, 673 S.W.2d 316, 323 (Tex. App.--Houston [1st Dist.] 1984, *no writ*); Open Records Decision Nos. 319 (1982), 195 (1978). Therefore, to the extent the city has failed to comply with the requirement of section 552.301, the city may not withhold such records should they exist.

As a preface to our discussion, we note that you did not initially assert the applicability of section 552.103(a) to the records responsive to the first request. Normally, a governmental body must raise an otherwise applicable exception to required public disclosure within ten business days following the governmental body's receipt of an open records request. *See* Gov't Code § 552.301(a). This office usually will not consider an exception raised after the initial ten business days unless there exists a compelling reason for doing so. Open Records Decision No. 515 at 6 (1988). However, subsequent to your initial letter raising section 552.101 as an exception to disclosure as for the first request, in your letter dated September 2, 1998, you state that "since we wrote to you on August 26, 1998, Mr. Rodriguez has threatened litigation." Based on the specific facts presented in this file, this office agrees to consider the applicability of section 552.103 to the information being requested.<sup>3</sup> In arriving at this decision, we assume good faith on the part of the city in taking a reasonable amount of time to raise the litigation exception. *See* Gov't Code § 552.228(a) ("it shall be a policy of a governmental body to provide a suitable copy of public information within a reasonable time after the date on which the copy is requested."); Open Records Decision No. 467 (1987).

Section 552.103(a), known as the litigation exception, excepts from required public disclosure information

(1) relating to litigation of a civil or criminal nature or settlement negotiations, to which the state or a political subdivision is or may be a party or to which an officer or employee of the state or a political subdivision, as a consequence of the person's office or employment, is or may be a party; and

(2) that the attorney general or the attorney of the political subdivision has determined should be withheld from public inspection

When asserting section 552.103(a), a governmental body must establish that the requested information relates to pending or reasonably anticipated litigation. Thus, under section 552.103(a) a governmental body's burden is two-pronged. The governmental body must establish that (1) litigation is either pending or reasonably anticipated, and that (2) the requested information relates to that litigation. *See Heard v. Houston Post Co.*, 684 S.W.2d 210, 212 (Tex. App.--Houston [1st Dist.] 1984, writ ref'd n.r.e.); Open Records Decision No. 551 at 4 (1990).

To establish that litigation is reasonably anticipated, a governmental body must provide this office "concrete evidence showing that the claim that litigation may ensue is

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<sup>3</sup>This office will consider changes in circumstances surrounding litigation when timely informed by governmental body of changes. Open Records Decision No. 638 at 3 (1996).

more than mere conjecture.” Open Records Decision No. 452 at 4 (1986). Concrete evidence to support a claim that litigation is reasonably anticipated may include, for example, the governmental body’s receipt of a letter containing a specific threat to sue the governmental body from an attorney for a potential opposing party.<sup>4</sup> Open Records Decision No. 555 (1990); *see* Open Records Decision No. 518 at 5 (1989) (litigation must be “realistically contemplated”). On the other hand, this office has determined that if an individual publicly threatens to bring suit against a governmental body, but does not actually take objective steps toward filing suit, litigation is not reasonably anticipated. *See* Open Records Decision No. 331 (1982). Whether litigation is reasonably anticipated must be determined on a case-by-case basis. Open Records Decision No. 452 (1986).

In this instance, you state that the requestor is represented by an attorney and that the requestor has threatened “to bring a whistleblower lawsuit against the City.” *See* Open Records Decision No. 288 (1981). You have also submitted two affidavits to support your determination that litigation is reasonably anticipated. Under the facts presented, we conclude that you have made the requisite showing that the submitted information relates to reasonably anticipated litigation for purposes of section 552.103(a). The city may withhold the requested records from the requestor based on section 552.103.

Please note, however, that, absent special circumstances, once information has been obtained by all parties to litigation, either through discovery or otherwise, no section 552.103(a) interest exists with respect to that information. Open Records Decision Nos. 349, 320 (1982). To the extent the requestor has seen or had access to these records -- *e.g.* the August 24, 1998 memo to Mr. Rodriguez from Mr. Joseph LaBeau -- there is no justification for now withholding such information from the requestor pursuant to section 552.103(a), except for information which is confidential by law. Similarly, section 552.103 does not cover the information the potential opposing party apparently submitted to the city-- *e.g.* the February 22, 1998 memo from Mr. Rodriguez -- nor does section 552.101<sup>5</sup> protect such information in this instance. In addition, the applicability of section 552.103(a) ends once the litigation is concluded. Attorney General Opinion MW-575 (1982); Open Records Decision No. 350 (1982).

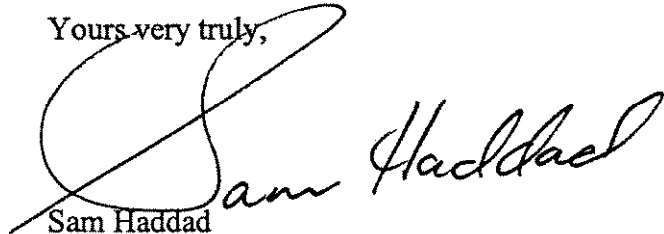
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<sup>4</sup>In addition, this office has concluded that litigation was reasonably anticipated when the potential opposing party took the following objective steps toward litigation: filed a complaint with the Equal Employment Opportunity Commission, *see* Open Records Decision No. 336 (1982); hired an attorney who made a demand for disputed payments and threatened to sue if the payments were not made promptly, *see* Open Records Decision No. 346 (1982); and threatened to sue on several occasions and hired an attorney, *see* Open Records Decision No. 288 (1981).

<sup>5</sup>Information about public employees’ job performance and work behavior is commonly held not to be excepted from required public disclosure under common-law privacy. Open Records Decision Nos. 470 at 4 (1987) (public has legitimate interest in job performance of public employees), 423 at 2 (1984) (scope of public employee privacy is narrow).

We are resolving this matter with this informal letter ruling rather than with a published open records decision. This ruling is limited to the particular records at issue under the facts presented to us in this request and may not be relied upon as a previous determination regarding any other records. If you have questions about this ruling, please contact our office.

Yours very truly,

A handwritten signature in black ink, appearing to read "Sam Haddad". The signature is written in a cursive style with a large, looping initial "S".

Sam Haddad  
Assistant Attorney General  
Open Records Division

SH/mjc

Ref.: ID# 119573

Enclosures: Submitted documents

cc: Mr. Arnold Rodriguez  
1910 North 8<sup>th</sup> Street  
Harlingen, Texas 78550  
(w/o enclosures)